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No. 84-1484

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; AND GARY C. SHEALY,

Appellants,

v.

GOULD INC., a Delaware Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLANTS

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QUESTION PRESENTED

Under the Supremacy Clause and the preemption rules of the National Labor Relations Act ("NLRA"), 29 U.S.C. sec. 151 et seq., may a state refuse to purchase products manufactured or sold by recidivist violators of the NLRA?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption. Two of the state officials are described in their official capacity, not by name. See Rule 40.4 of this Court. The Secretary of the Department of Industry, Labor, and Human Relations who was in office at the time the action began has resigned and is succeeded by Howard S. Bellman. See Rule 40.3 of this Court. The three state agency appellants are here sub nomine only, as they were dismissed below. See court of appeals decision at n. 1 (Jur. St. Apx. at 2-3).

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REPORTED DECISIONS

The court of appeals' decision is reported as Gould, Inc. v. Wisconsin Dept. of Industry, Labor, 750 F.2d 608 (7th Cir. 1984). The district court's decision is reported as Gould v. Wis. Dept. of Industry, Labor & H. Rel., 576 F. Supp. 1290 (W.D. Wis. 1983).

JURISDICTIONAL GROUNDS

Appellee sought declaratory and injunctive relief against Wisconsin statutes on the ground of their unconstitutionality. It posited district court jurisdiction under 28 U.S.C. secs. 1331 and 1343(3). The district court declared the statutes unconstitutional as repugnant to the Supremacy Clause and the preemption principles of the NLRA. Appellants appealed to the Court of Appeals for the Seventh Circuit, invoking

its jurisdiction under 28 U.S.C. sec. 1291.

The court of appeals affirmed and entered its judgment on December 13, 1984. Notice of appeal was filed February 18, 1985, in the Court of Appeals for the Seventh Circuit. This Court noted probable jurisdiction on May 20, 1985. It has jurisdiction under 28 U.S.C. sec. 1254(2).

STATUTES INVOLVED

The statutes declared unconstitutional are Wis. Stats. secs. 16.75(8) and 101.245 (1981) as created by chapter 340, Wis. Laws of 1979, effective May 21, 1980, as follows:

....

> SECTION 2. 16.75 (8) of the statutes is created to read:
>
> 16.75 (8) The department [of administration] shall not

purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the department of industry, labor and human relations under s. 101.245.

SECTION 3. 101.245 of the statutes is created to read:

101.245 Labor law violators. (1) The department [of industry, labor and human relations] shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court within a 5-year period as determined under sub. (1m), if the 3 final decisions involved a cumulative finding of at least 3 separate violations to have violated the national labor relations act, 29 USC 151 et. seq., and of persons or firms that have been found to be in contempt of court for failure to correct a violation of the national labor relations act on 3 or more occasions by a court within a 5-year period as determined under sub. (1m) if the 3 contempt findings involved a cumulative total of at least 3 different violations.

(1m) On or before July 1 of each year the department shall compile the list required

under sub. (1) based upon the 5-year period which ended on September 30 of the year preceding.

(2) This list may be compiled from the records of the national labor relations board.

(3) Whenever a new name is added to this list the department shall send the name to the department of administration for action as provided in s. 16.75(8).

(4) A name shall remain on the list for 3 years.

(5) If any person or firm files a written statement with the department alleging that the person's or firm's name should not be included on this list because the person or firm did not violate that national labor relations act as provided in sub. (1) or that 3 years have passed since the person's or firm's name was included on the list, the department shall hold a hearing on the matter. If the department finds that the allegations in the person's or firm's statement are correct, the department shall notify the department of administration that it should remove the person's or firm's name from the list.

....

STATEMENT OF THE CASE

Appellee is a Delaware corporation principally doing business in Illinois. It has twenty separate divisions. Each division maintains its own labor relations policies. (R.2.)

During a five year period, the federal court of appeals affirmed and/or enforced findings of the National Labor Relations Board (NLRB) of four distinct violations of the NLRA. They were:

> NLRB v. Gould, Inc., 550 F.2d 1060 (6th Cir. 1977), enforcing 221 NLRB No. 127, 91 LRRM 1013 (1974) (unlawful interrogation, surveillance, and discharge threats);
>
> NLRB v. Gould, Inc., 542 F.2d 1176 (6th Cir. 1976), cert. denied, 430 U.S. 907 (1977), enforcing 216 NLRB No. 183, 88 LRRM 1581 (1975) (discriminatory discharge);
>
> NLRB v. Gould, Inc., 638 F.2d 159 (10th Cir. 1980),

cert. denied, sub. nom. Brown Boveri Electric, Inc. v. NLRB, 452 U.S. 930 (1981), enforcing 238 NLRB No. 88, 99 LRRM 1705 (1978) (discriminatory discharge); and

Gould, Inc., Elec. Components Div. v. NLRB, 610 F.2d 316 (5th Cir. 1980), enforcing 273 NLRB No. 16, 99 LRRM 1001 (1978) (refusal to bargain after losing decertification election).

At the material times appellee's divisions were doing business wth the state in amounts in excess of $10,000. One division had outstanding bids in that amount to provide goods and services to the state. On August 25, 1982, pursuant to the state statutes and based on the noted NLRA violations, appellants debarred appellee for three years from doing business with the state, and advised they would cancel existing contracts if that could be done without penalty. (R.2.)

Appellee commenced this action in February 1983 alleging NLRA preemption and a denial of equal protection and due process. On February 18, 1983, the district court granted preliminary injunctive relief. (J. A. at 4-5.) The parties filed cross motions for summary judgment. On January 23, 1984, the district court declared the Wisconsin statutes unconstitutional as preempted by the NLRA, and permanently enjoined the individual appellants from debarring plaintiff under those statutes, refusing to purchase its goods, or including it on the labor law violators list. (Jur. St. Apx. at 45-83, 86-87.) The district court subsequently awarded attorney's fees to appellee under 42 U.S.C. sec. 1988. The court of appeals affirmed the declaration of the statutes' unconstitutionality on supremacy and

preemption grounds but not on equal protection or due process grounds, and reversed the judgment awarding attorney's fees. (Jur. St. Apx. at 1-44, 84-85.)

SUMMARY OF ARGUMENT

Wisconsin's statute directs its purchasing department not to buy from firms who have been found by the federal courts to have violated the National Labor Relations Act (NLRA), 29 U.S.C. sec. 151 et seq., three times in a five year period. Federal appeals courts found appellee to have violated the NLRA on four different occasions in five years.

Wisconsin's decision not to buy from appellee is the act of a market participant, not of a market regulator. The selection of a vendor for its own goods and services constitutes direct

participation in the market. The statute does not direct municipalities or others whether to deal with appellee, nor does it provide a remedy to the victims of the NLRA violations. It is a purchasing decision.

States have the same right as any private entrepreneur to choose with whom they will deal. What is more, a state's exercise of this right implicates sovereign prerogatives over critical policy choices, for which the commerce clause requires no independent justification but for which federalism demands deference.

NLRA preemption relates to state regulation, not its market participaton. The NLRA no more preempts a state's market participant choice than a private corporation's. In fact, the NLRA affirmatively protects the right of

market participants to choose with whom they will deal. The fact that their choices may impact on the businesses of others, including their labor relations, is wholly irrelevant to whether they are the decisions of market participants.

Even if Wisconsin's decision partakes of regulatory features as well as market participant features, traditional NLRA preemption principles are not offended. The NLRA's interest is peripheral at best as to whether Gould and Wisconsin choose to do business with each other. But both Gould and Wisconsin have a substantial interest in preserving their right to make that choice, and under principles of federalism the

state's interest is even weightier because of the political accountability and responsibility entailed.

What is more, there is absolutely no risk of conflicting regulation. The controversy submitted to the federal forum is not at all identical to what is submitted in the state forum. Wisconsin accepts the results of the federal adjudication without question. No relief is provided to the victims. It simply refuses to help the NLRA repeat violators make profits. And the Board could not debar Gould from doing business with Wisconsin.

ARGUMENT

I. Wisconsin Acts As A Market Participant

Wisconsin is acting as a market participant, not a market regulator. For

its decision concerns from whom to purchase its own goods and services.

The question of market participant status reduces to a "'single inquiry: whether the challenged "program constitute[s] direct state participation in the market."'" White v. Massachusetts Council of Const. Employers, 460 U.S. 204, 208 (1983).

Wisconsin's statute directs only its own purchasing department in its choice of vendors. Wis. Stats. § 16.75(8). It does not regulate purchases by municipalities or other nonstate entities. Compare W.C.M. Window Co., Inc. v. Bernardi, 730 F.2d 486, 494-96 (7th Cir. 1984) (state crossed the participant line and became a regulator by imposing restrictions on local governments). Therefore, the test is met: this statute deals only with

"direct state participation in the market."

Wisconsin's status as a market participant also easily accords with the facts of the lead cases. The City of Camden acted as a market participant in pressuring private employers to hire city residents on the city's own public works projects. United Bldg. & Const. v. Mayor & Council of Camden, 104 S.Ct. 1020, 1028-29 (1984). Boston could do likewise, despite the impact on out-of-state firms, because all affected contractors and employes effectively were working for the city. White, 460 U.S. at 211 n. 7. South Dakota could sell its cement solely to its residents, despite the apparent provincialism. Reeves, Inc. v. Stake, 447 U.S. 429 (1980). For the

dormant commerce clause inhibits the states as market regulators, not as market participants. Id. at 436-39.

> The basic distinction drawn in [Hughes v.] Alexandria Scrap [infra] between States as market participants and States as market regulators make good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national market place .... There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.

447 U.S. at 436-37 (citations omitted). And Maryland, acting as a market participant, could subsidize local scrap processors; the commerce clause "was [not] intended to require independent justification for such action." Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 808-09 (1976).

Wisconsin's choice of a vendor is merely the other side of the Reeves coin,

which concerned the choice of a buyer. Therefore, Wisconsin "unquestionably" acts as a market participant. See Reeves, 447 U.S. at 440. Further, Wisconsin's act is narrower than that upheld in White, where Boston controlled its contractors' choice of employes. Wisconsin controls only its choice of a contractor, not downstream trading partners. A fortiori "it is not relevant" if Wisconsin's act has "a significant impact" on contractors, their trading partners, or commerce in general. See White, 460 U.S. at 209-10.

Further, Wisconsin's status as a market participant fits the standards of even the dissenting opinions. Wisconsin only selects "the providers of the goods it purchases;" it does not "impede trade" among others; rather, it "govern[s] the State's own economic conduct ... to

determine the parties with whom it will deal." White, 460 U.S. at 218, 221-22 (Justices White and Blackmun, dissenting). Wisconsin has "enter[ed] the market to supply its own needs." Reeves, at 447 U.S. at 452 (Justices Powell, Brennan, White, and Stevens, dissenting). Its statute addresses the purchases needed only for its own "end use." Hughes, 426 U.S. at 824 (Justices Brennan, White, and Marshall, dissenting). Nor is Wisconsin's choice as a market participant a ruse for favoring its own residents over out-of-state businesses. Its rule applies to local industry as well.

Thus, this case is unlike South-Central Timber Development, Inc. v. Wunnicke, 104 S.Ct. 2237 (1984). This Court found that Alaska did not act as a market participant when it required, as a

condition of resale of its timber, that it be initially processed within the state. Rather than address the "immediate transaction" of selecting a buyer, Alaska had imposed resale, "downstream restrictions" akin to "restraints on alienation" and "vertical restraints" inimical to antitrust principles. Id. at 2246. Wisconsin, in contrast, imposes no conditions on resale. Its act starts and stops with the "immediate transaction" of selecting a vendor. It would be irrelevant if its act has the "effect of regulating employment" between its vendor and its employes, for the commerce clause itself "places no limitations on a State's refusal to deal with particular parties when it is participating in the interstate market in goods." Id. at 2244. Also compare Hicklin v. Orbeck,

437 U.S. 518, 531, 534 (1978) (invalidating Alaska Hire law that virtually imposed a vertical integration on the industry developing the state's gas and oil reserves).

The underlying constitutional principles reinforce this conclusion. The states long have enjoyed the same right of any trader "'freely to exercise his own independent discretion as to parties with whom he will deal.'" Reeves, 447 U.S. at 438-39. Simply as a matter of "[e]venhandedness ... when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." Id. at 439. Nothing in the Constitution "limit[s] the ability of the States themselves to operate freely in the free market." Id. at 437.

A state's power to choose its trading partners is broad. This Court has said it is "unrestricted" and includes the power to "fix terms and conditions upon which it will make needed purchases." Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940). Whether or not the power remains "unrestricted," it is not diminished one whit because it entails a political decision. Reeves, 447 U.S. at 439 n. 12. Indeed, it is because these decisions are "politically charged" that disputes are "better suited for Congress than this Court." Id. at 439.

State sovereignty is implicated. A state need not assert a Tenth Amendment right to "claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal." Reeves, 447 U.S. at

438 n. 10. For the state acts "'"as guardian and trustee for its people."'" Id. at 438. And, in claiming this sovereign prerogative, the commerce clause does not require "independent justification." Hughes v. Alexandria Scrap Co., 426 U.S. 794, 808-09 (1976). See generally, Garcia v. San Antonio Metro. Transit Authority, 105 S.Ct. 1005, 1015-17 (1985).

The court of appeals was essentially nonresponsive to Wisconsin's market participant status. It held: (1) the dormant commerce clause cases are inapposite because Congress has legislated decisively in the area, Gould, Inc. v. Wisconsin Dept. of Industry, Labor, 750 F.2d 608, 613 (7th Cir. 1984), Jur. St. Apx. at 22; (2) Wisconsin's purpose is to induce compliance with the NLRA, not to efficiently spend its money,

750 F.2d at 614, Jur. St. Apx. at 29; and (3) Wisconsin has imposed a penalty that intrudes on the remedial structure of the NLRA, 750 F.2d at 612 n. 4, Jur. St. Apx. at 15.

But each of these grounds for striking the statute begs the premise that Congress has foreclosed market participant choices of this sort. If the premise is incorrect, the court left unanswered whether Wisconsin's act is that of a market participant.

No one can doubt that such action by General Motors would be market participant action. It follows, simply as a matter of "[e]venhandedness," that its character remains the same when done by a state. Reeves, 447 U.S. at 439. General Motors can choose not to buy from Gould because of its recidivism without offending the NLRA, and so can Wisconsin;

General Motors' decision would not impose a "penalty" on Gould that intrudes on the NLRA remedial scheme, and neither would Wisconsin's; and General Motors would not need to justify its decision as economically prudent, or apologize for seeking to induce compliance with the NLRA, and neither would Wisconsin.

What is more, Wisconsin's sovereign prerogatives serve to further insulate its policy choices as a market participant from judicial approval. See Reeves, 447 U.S. at 439. General Motors must answer to stockholders. A state's constituency, however, may exact economic inefficiency as a price worth paying for other policy choices, both moral and social, e.g. preserving the environment, promoting affirmative action, improving worker safety, relieving the poor, etc. Nothing in the commerce clause excepts

the state's right to decide whether to acquire its own goods and services from labor law recidivist violators.

It is one matter to agree, as generally we must, that Wisconsin may not regulate conduct regulated by the NLRA, however egregious the conduct may be. It is quite another matter to say Wisconsin must contribute to the profits of miscreants by hiring them. Compare Harris v. McRae, 448 U.S. 297, 316 (1980) (the duty not to interfere with the absolute constitutional right of a woman to abort does not require Congress to pay for it).

II. The NLRA Does Not Preempt The Choices Of Market Participants; It Protects Them

The foregoing teach the distinction between the state as a market participant and the state as a market regulator.

The NLRA cases teach that preemption reaches the states only as market regulators. "The doctrine of labor law pre-emption concerns the extent to which Congress has placed implicit limits on 'the permissible scope of state regulation of activity touching upon labor-management relations.'" New York Tel. Co. v. New York St. Dept. of Labor, 440 U.S. 519, 527 (1979) (emphasis added).

At least two reasons explain why Congress has preempted state regulation but not state market participation. First, the very purpose of preemption is to "avoid conflicting regulation of conduct." Motor Coach Employees v. Lockridge, 403 U.S. 274, 285-86 (1971). A state's regulation is the nemesis preemption addresses, not its market participation. Second, the NLRA

regulates the relationship between employer and employe, not the trading partner choices of market participants. The "NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment ... ." Metropolitan Life Ins. Co. v. Mass., 105 S. Ct. 2380, 2396 (1985).

There is no reason to suppose Congress meant to discriminate by preempting the market participant choices of the states but not the market participant choices of private corporations. If anything, one would expect Congress to regulate private industry choices before those of the sovereign states. But it has regulated neither in the NLRA. Wisconsin is as free as General Motors to decline to do

business with appellee by reason of its recidivism.

In point of fact, the NLRA affirmatively protects the market participant's right to select a trading partner. The NLRA forbids union strikes "to force one employer to cease doing business with another." NLRB v. Longshoremen, 447 U.S. 490, 503 (1980). See NLRB v. Denver Bldg. & Constr. T. Council, 341 U.S. 675, 687 (1951). Congress was bent on "shielding unoffending employers and others from pressures in controversies not their own." Id., 341 U.S. at 692. It intended to protect the "freedom of choice ... whether to refuse to deal with another or to maintain normal business relations ... ." Local 1976, U.B.C. & J. v. NLRB, 357 U.S. 93, 105 (1958).

Exceptions to this broad principle are narrow. See Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616, 625, 635 (1975) (the antitrust principles of free trade will yield where necessary to eliminate competition over workers' wages); Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 663-64 (1982) (construction industry exception to the ban on "hot cargo" agreements); NLRB v. Pipefitters, 429 U.S. 507 (1977) (work preservation agreements). Apart from these narrow exceptions, even a state or political subdivision may invoke the jurisdiction of the NLRB for protection of its market participant choice of a contractor to contruct its buildings. See Plumbers, Etc., 298 v. County of Door, 359 U.S. 354 (1959).

The principal error of the court of appeals was its failure to appreciate

that the NLRA does not restrict market participant choices. It is ironic that the court of appeals concluded that the NLRA, which protects Wisconsin's right as a market participant to choose with whom to deal, was offended by Wisconsin for choosing not to deal with NLRA offenders.

As a market participant, Wisconsin can make its choices despite impact, if any, on the labor relations of others. Cf. See White v. Massachusetts Council of Const. Employers, 460 U.S. 204, 209-10 (1983) (imposing significant burdens on labor relations in commerce is not relevant to the inquiry whether the city acted as a market participant). Accord, Amalgamated Transit Union, Div. 819 v. Byrne, 568 F.2d 1025, 1029 (3rd Cir. 1977) (en banc) (New Jersey could refuse to subsidize transportation services if the service agreed with its union to pay

a cost of living pay adjustment); Image Carrier v. Beame, 567 F.2d 1197, 1202-03 (2nd Cir. 1977) (city could refuse to buy from nonunion printers). Also see Oklahoma v. United States Civil Serv. Comm., 330 U.S. 127, 143 (1947) (although, as a general matter, Congress may not regulate state employes' political activity, it may do so as a condition of exercising its spending power).

Congress has chosen not to use its spending power or status as a market participant to debar NLRA recidivists. Proposed Labor Law Reform Bill of 1978, S. 2467, H. 8410, 95 Cong. 2d Sess. 30 (1978). The reasons for rejecting the debarment proposal ranged widely, including concern that it was punitive, that it would apply to employers but not to offending unions, and that it would

fall most heavily on innocent employes. See 124 Cong. Rec. S. 13843 (May 16, 1978). The federal government's choice not to exercise its right as a market participant hardly abrogates the right of other market participants to make that policy choice. The contrary suggestion confuses the apples and oranges of market participant versus market regulator, to-wit: "When the State acts solely as a market participant no conflict between State regulation [emphasis this Court's] and federal regulatory authority can [emphasis added] arise." United Bldg. & Const. v. Mayor & Council of Camden, 104 S. Ct. 1020, 1028 (1984).

Wisconsin's choice as a market participant, rather than conflicting with NLRA regulatory authority, is protected by it.

III. NLRA Preemption Would Not Apply In Any Event

Even if Wisconsin's statute were regulatory and not the choice of a market participant, it is not preempted because (a) the controversy presented to the two forums is not identical and (b) Gould's business opportunities with Wisconsin are at best only a peripheral concern of the NLRA, whereas the right to choose a trading partner is of substantial interest to any market participant, particularly a sovereign state which must make critical and controversial policy choices in the process.

Federal preemption of state law is not lightly implied. Bill Johnson's Restaurant, Inc. v NLRB, 461 U.S. 731, 103 S.Ct. 2161, 2175 (1983) (Brennan, J., concurring). Various "historical powers over ... traditionally local matters" were left to the states by the NLRA.

Allen-Bradley Local No. 1111, etc. v. Wisconsin E. Rel. Board, 315 U.S. 740, 749 (1942). Letting public works contracts is such an established power. Cf. American Yearbook Company v. Askew, 339 F. Supp. 719, 721 (M.D. Fla.), aff'd without opinion, 409 U.S. 904 (1972). This Court demands "compelling congressional direction" before it will oust states from areas that are tradtionally rooted in local responsibility or are merely of peripheral concern to the NLRA. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959).

Federal preemption never is found unless necessary to "avoid conflicting regulation of conduct." Motor Coach Employees v. Lockridge, 403 U.S. 274, 285-86 (1971). In labor law two doctrines have surfaced to test for

conflict: (1) whether the conduct was meant by Congress to go unregulated, like concerted refusals to work overtime, Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976); or (2) whether the conduct arguably is protected or prohibited by the NLRA, like picketing. Garmon, 359 U.S. at 245.

The Machinists doctrine is inapplicable. It relates only to the economic weaponry between union and employer. See Belknap, Inc. v. Hale, 103 S.Ct. 3172, 3188 (1983) (Blackmun, J., concurring).

Garmon's "arguably" standard aims to protect the NLRB's primary jurisdiction. Exceptions have emerged to protect local interests. In such cases, federalism itself "belies any easy inference that Congress intended to

deprive the States of their ability to retain jurisdiction." Brown v. Hotel & Restaurant Employees & Bartenders, 104 S.Ct. 3179, 3187 (1984).

This Court has finely honed Garmon's arguably protected or prohibited test: the state controversy and the federal controversy must be identical. In Belknap, the state could provide a damage remedy to striker replacements, who were promised permanent employment, after the employer removed them pursuant to settlement of an arguably unfair labor practice strike. "The Board would be concerned with the impact on strikers not with whether the employer deceived replacements." Belknap, 103 S.Ct. at 3183. The state court could not order job reinstatement the Board could provide the strikers, but it could provide damage relief the Board could not provide

replacements. Id. Similarly in Farmer v. Carpenters, 430 U.S. 290 (1977), a state court could provide relief for emotional distress arising from conduct the Board could address by other means. Such actions can be adjudicated "without regard to the merits of the underlying labor controversy." Farmer, 430 U.S. at 300. In Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978), the state could regulate the locus of picketing because the Board could address only its purpose. In Linn v. United Plant Guard Workers, 383 U.S. 53, 63 (1966), state law could award damages for defamatory conduct injuring reputation that the Board could remedy only as to its labor relations impact. The task always is to balance the respective federal-state interests and the risk of

conflicting regulation. Farmer, 430 U.S. at 298-301.

Clearly, conflicting regulation is impossible. The controversies presented in the two forums are far from identical. The NLRB could not debar Gould from doing business with Wisconsin. Wisconsin does not adjudicate whether the NLRA was violated or provide a remedy to the employes. It finds only whether the appeals courts have said the NLRA was violated, how may times, and in what period. Wisconsin acts only as a market participant by a "simple unilateral refusal[] to deal." White v. Massachusetts Council of Const. Employers, 460 U.S. 204, 218 (1983) (Blackmun, J. dissenting).

In addition to the controversies being anything but identical, the NLRA interest in preserving Gould's right to

do business with Wisconsin is virtually nonexistent. Indeed, the NLRA's only interest is to preserve the right of traders to decide whether to deal with each other. Wisconsin's interest, on the other hand, is keen: how to spend taxpayers' money and for whose benefit, in purchasng what it needs to carry out its governmental purposes, lie at the core of important social and policy choices for which local responsibility and accountabiity are at their highest. Surely this interest is far more substantial than any peripheral implications the decision may have for the NLRA. Cf. Massachusetts Nursing Ass'n v. Dukakis, 726 F.2d 41 (1984) (sustaining hospital cost containment legislation despite impact on collective bargaining); Golden State Transit v. City of Los Angeles, 686 F.2d 758 (9th Cir.

1982), cert. denied, 459 U.S. 1105 (1982), after remand, 754 F.2d 830 (9th Cir.), cert. denied, 105 S.Ct. 1865 (1985) (sustaining city denial of a taxicab license to one engaged in a labor dispute).

There is no NLRA preemption, then, even if Wisconsin's act is regulatory. First, conflicting regulation is impossible. Second, Wisconsin's interest in choosing a trading partner far surpasses any NLRA interest in how or why Wisconsin makes that choice.

CONCLUSION

It is respectfully submitted that this Court should reverse the judgment of the court of appeals insofar as it affirms the judgment of the district

court that the state statutes in question are unconstitutional.

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